IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 448 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?
1 to 5 = No

SIRAZ RAJABALI NATHANI

Versus

MUNIRA MOHMADALI AVADIA

Appearance:
MR CC KAMDAR for Petitioners
MR CH VORA for Respondent No. 1
Mr. S.A. Pandya, APP, for Respondent No. 2

CORAM : MR.JUSTICE M.H.KADRI
Date of decision: 27/04/98

ORAL JUDGEMENT

Rule. Service of Rule is waived by learned Additional Government Pleader, Mr. S.A. Pandya, for respondent No.2 and learned advocate Mr.C.H. Vora for respondent No.1. By the consent of the learned advocates for the parties, this Criminal Misc. Application is

taken up for final hearing.

The petitioner has approached this Court, by way of filing this Criminal Misc. Application, under Section 482 of the Code of Criminal Procedure ('Code' for short), for quashing the complaint, which is registered as Criminal Enquiry No.5/98, in the Court of learned Chief Judicial Magistrate, Bhuj, for the offences punishable under Sections 406 and 114 of the Indian Penal Code. The complaint was filed by respondent No.1 on January 9, 1998 against the petitioners and the learned Chief Judicial Magistrate has passed the following order.

"Heard the read the papers concerning the facts of the case. There is the question of recovery of ornaments. Police investigation is also required and it is necessary to send the complaint for police investigation under Section 156(3) of the Criminal Procedure Code and P.I. Bhuj City is ordered to investigate, and to send the report within 30 days."

In the complaint, it is alleged by respondent No.1 that her marriage with petitioner No.1 took place at Bhuj as per their customary rites. It is alleged that, after the marriage, petitioner No.1 started harassing her and, therefore, she could live with him only for eight to nine days in her matrimonial home. It is alleged that petitioner No.1 was treating her as a maid-servant, and she was driven out from her matrimonial home and she was not allowed to take any of her belongings with her. It is further alleged that, at the time of marriage, her parents, friends, and relatives had given to her the gift articles and ornaments worth Rs.93,000/-. Along with the complaint, she annexed a list of ornaments and gift articles given to her by her parents, friends, and relatives at the time of marriage. It is alleged that the said ornaments and gifts were, in fact, 'Sridhan', and, therefore, the petitioners have no right to retain the said property.

It is further alleged that, after her return to the maternal home, the petitioners were persuaded to return her belongings, ornaments and gift articles, but they have refused to part with those articles. It is further alleged that, after respondent No.2 was driven out from her matrimonial home, petitioner No.1 has married petitioner No.2, and all her ornaments and other items which belonged to her were handed over to petitioner No.2 for her personal use. On the basis of these allegations, respondent No.2 alleged that all the petitioners have committed offences punishable under Sections 406 and 114 of the Indian Penal Code.

The learned advocate for the petitioners has, vehemently, submitted that the order passed by the learned Chief Judicial Magistrate directing the police to investigate into the complaint under Section 156(3) of the Code, is patently illegal and wrong, in view of the decision of this Court (Coram: S.M. Soni, J.) in the case of Suresh Kumar Gupta vs. State of Gujarat & Another, reported in 1997 (1) GLH p.356. Reliance is placed on the above decision in support of the submission that, when the learned Magistrate, in exercise of the powers under Section 156(3) of the Code, directs the police to investigate, he is bound to give reasons, and, if no reasons are given, the order is bad.

On the other hand, the learned advocate for respondent No.1, in support of his submission, has placed reliance on the decision of this Court (Coram: P.M. Chauhan, J.) in the case of Kanaksinh Hathisinh Jadeja & others vs. Balbhadrasinh Narendrasinh Jhala & Anr. reported in 28(2) GLR p.1219. The learned single Judge, in the case of Kanaksinh Hathisinh Jadeja (supra), after considering the provisions contained in Sections 156(3) and 202 of the Code, has held that, if a Magistrate orders investigation by police under sub-section (3) of Section 156 of the Code, he cannot be said to have taken cognizance of any offence. It is further held that the power to order police investigation under sub-section (3) of section 156 of the Code is different from the power to direct the investigation conferred by sub-sec. (1) of section 202 of the Code. Both of them operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, while the other at the post-cognizance stage when the Magistrate has seized over the matter. It is further held that the provisions of Section 156 of the Code are applicable at the pre-cognizance stage, while the provisions of Sections 200 and 202 of the Code are applicable at the post-cognizance stage. The Magistrate is not bound to take cognizance of the offence on receiving a complaint and he may, without taking cognizance direct investigation of the case by the police under sub-sec. (3) of sec.156 of the Code. After considering the scheme of various provisions of the Code, the learned single Judge in the case of Kanaksinh Hathisinh Jadeja (supra) has held that the Magistrate directing enquiry under Section 156(3) of the Code is not required to state reasons for his order.

The learned advocate for respondent No.1 has also placed reliance on the decision of this Court (Coram:

M.B. Shah, J. as he then was) in the case of Harshadbhai C. Patel vs. Indravadan P. Shah & Another, reported in G.L.T Vol. XXIII p.238. In the above decision, it is held as under:

"If the Court is satisfied that the facts alleged in the complaint necessitate the investigation by the police and in the absence of such investigation the material evidence cannot be gathered, then he may direct investigation under Section 156(3) of the Criminal Procedure Code. But in those cases where the complainant is in possession of necessary material, then there is no question of ordering investigation under Section 156(3) of the Criminal Procedure Code."

The complainant, in her complaint, has specifically alleged that the ornaments and other articles are in possession of the petitioners, who are arraigned as accused in the complaint filed by her. In the facts and circumstances of the case, in my opinion, the learned Magistrate was justified in passing the order of investigation under Section 156(3) of the Code. The learned Magistrate, as quoted above, has given short reasons in the order that there is question of recovery of ornaments and, therefore, he thinks it fit to direct the police to investigate. Even if, according to the judgment of this Court in Suresh Kumar Gupta (supra), the learned Magistrate is required to give short reasons, in my view, the learned Magistrate has given cogent reasons while ordering police investigation under Section 156(3) of the Code. As per the decision of this Court in Kanaksinh Hathisinh Jadeja (supra) the learned Magistrate, having received the complaint, does not take cognizance, but direct the police to investigate. In that case, no reasons are necessary. In this case also, the learned Magistrate, without taking cognizance, and looking to the facts of the case, has directed the police to investigate and, therefore, the learned Magistrate was not bound to give reasons when he directs the police to investigate under Section 156(3) of the Code.

With respect to the learned single Judge, while deciding the point involved in the case of Suresh Kumar Gupta (supra), the attention of the learned single Judge was not drawn to the reported decision of another learned single Judge of this Court in the case of Kanaksinh Hathisinh Jadeja & others vs. Balbhadrasinh Narendrasinh Jhala & Anr. reported in 28(2) GLR p.1219.

The learned advocate for the petitioners further submitted that, as per the decision of the Full Bench of

this Court, in the case of Gujarat Housing Board vs. Nagajibhai Maxmanbhai & Others, reported in 1985 (2) GLR 1190, which is followed by the Division Bench of this Court, in the case of T.S. Rabari vs. Government of Gujarat & Another, reported in 1991(2) G.L.R. 1035, when there are conflicting decision of two learned single Judges, then the latter decision should be followed.

It is true that I am bound by the decision of the Full Bench in the case of Gujarat Housing Board vs. Nagajibhai Maxmanbhai & Others, reported in 1985 (2) GLR 1190, which is followed by the Division Bench of this Court, in the case of T.S. Rabari vs. Government of Gujarat & Another, reported in 1991(2) G.L.R. 1035. But, if the latter decision is pronounced in ignorance of the former decision, it can be called as "judgement per inquerium". Therefore, in the facts and circumstances of the present case, I do not think it proper to follow the latter decision of the learned single Judge of this Court in the case Suresh Kumar Gupta (supra).

The learned Magistrate has given a short reasoned order as to why he is seeking the help of police investigation in the facts and circumstances of the case. In my view, the order is quite legal, valid and proper, and it is as per the guidelines given in the judgment rendered in the case of Suresh Kumar Gupta (Supra).

In the case of Madhu Bala v. Suresh Kumar, reported in 1998 Supreme Court Cases (Cri.) 111, the Supreme Court has held that;

"When a written complaint disclosing a cognizable offence is made before a Magistrate, he may take cognizance upon the same under Section 190(1) of the Code and proceed with the same in accordance with the provisions of Chapter XV. The other option available to the Magistrate in such a case is to send the complaint to the appropriate police station under Section 156(3) for investigation. Once such a direction is given under sub-section (3) of Section 156 the police is required to investigate into that complaint under sub-section (1) thereof and on completion of investigation to submit a 'police report' in accordance with Section 173(2) on which a Magistrate may take cognizance under Section (1)(b)but not under Section 190(1)(a). Since a complaint is filed before a Magistrate cannot be a 'police report' in view of the definition of 'complaint' referred to earlier and since the investigation of a 'cognizable case' by the police under Section 156(1) has to culminate in a 'police report' the 'complaint' - as soon as an order under Section 156(3) is passed thereon - transforms

itself to a report given in writing within the meaning of Section 154 of the Code, which is known as the first information report."

It is further held by the Supreme Court that:

"Whenever a Magistrate directs an investigation on a 'complaint' the police has to register a cognizable case on that complaint treating the same as the FIR and comply with the requirements of the above Rules. Therefore, it cannot be said that the direction of a Magistrate asking the police to 'register a case' makes an order of investigation under Section 156(3) legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(1) of the Code, which empowers the police to investigate into a cognizable 'case' and the Rules framed under the Indian Police Act, 1861, it (the police) is duty bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, do not in any way stand in the way of a Magistrate to direct the police to register a case at the police station and then investigate into the same. When an order for investigation under Section 156(3) of the Code is to be made the proper direction to the police would be 'to register a case at the police station treating the complaint as the first information report and investigate into the same'. "

As per the decision of the Supreme Court in the case of Madhu Bala (supra) also, the learned Magistrate has ample power to direct the police to investigate into the allegations made in the complaint. Therefore, in my view, the Magistrate had not acted illegally in directing the police to investigate, as there is question of recovery of ornaments, as alleged in the complaint. As per the allegations, it appears, prima facie, that the ornaments are in the custody of the petitioners and, therefore, it was necessary to hand over the investigation to the police. In this case, the learned Magistrate has not taken cognizance, but has directed the police to investigate into the allegations of the complaint. The learned Magistrate has given short reasoning as to why he wants the assistance of the police in investigation with regard to recovery of ornaments. Therefore, I do not find any illegality in the order of the learned Magistrate directing the police to investigate under Section 156(3) of the Code.

The allegations made in the complaint do, prima facie, disclose ingredients of criminal breach of trust. The ornaments, which are the property of respondent No.1, are in possession of the petitioners. The allegations

made in the complaint do, prima facie, show that the petitioners have illegally retained the ornaments and other gift articles, which are of the ownership of respondent No.1. Therefore, in my view, the allegations made in the complaint do, prima facie, disclose ingredients of Sections 406 and 114 of the Indian Penal Code. It is settled legal principle that, at the time of quashing of complaint, the court is required to see the allegations made in the complaint. When the complaint, prima facie, discloses ingredients of offences alleged against the petitioners, it is hazardous to quash the complaint at the threshold. This is not a rarest of rare case wherein interference of this Court in exercise of its inherent powers under Section 482 of the Code is called for.

As a result of foregoing discussion, this application is rejected. Rule is discharged.

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(swamy)